IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 01/11/2002
Coram

THE HONOURABLE Mr. B. SUBHASHAN REDDY, Chief Justice,
THE HONOURABLE Mr. Justice V.S. SIRPURKAR,
THE HONOURABLE Mr. Justice R. JAYASIMHA BABU,
THE HONOURABLE Mr. Justice P.D. DINAKARAN
and
THE HONOURABLE Mr. Justice C. NAGAPPAN

W.A. No.3221 of 2002 and W.A.M.P. No.5348 of 2002
and W.P. Nos.23615, 23616 and 33272 of 2002, W.P.M.P. Nos.32515 to 32518 and 49326 of 2002
and W.V.M.P. Nos.936, 1138, 1151 and 1558 of 2002.

W.A. No.3221 of 2002

M. Aarthi (Minor) rep. by her
mother and natural guardian
Mrs. M. Renuka ... Appellant

-Vs-

1. The State of Tamil Nadu,
rep. by its Secretary to Government,
Health & Family Welfare Department,
Fort St. George,
CHENNAI - 600 009.

2. The Director of Medical Education,
No.162, Periyar EVR High Road,
Kilpauk,
CHENNAI - 600 010.

3. The Selection Committee,
The Director of Medical Education,
No.162, Periyar EVR High Road,
Kilpauk,
CHENNAI - 600 010. ... Respondents

L.....T.....T.....T.....T.....T.....T.....T.....T.....T....J

Prayer: Appeal against the order in W.P. No.33838 of 2002 dated 3.9.2002 of the learned single Judge.

W.P. No.23615 of 2002

P. Sakthi Priya (Minor) rep. by her father & natural guardian M. Pechimuthu
... Petitioner

Vs.

1. The Secretary, Tamil Nadu Engineering Admissions, 2002 Anna University, CHENNAI - 600 025.

2. Government of Tamil Nadu, rep. by its Secretary, Dept. of Education, Fort St. George, CHENNAI - 600 009. ... Respondents

Prayer: Petition filed under Article 226 of Constitution of India for the issuance of a Writ of Declaration for the reasons as stated therein.

W.P. No.23616 of 2002

P. Sakthi Priya (Minor) rep. by her father & natural guardian M. Pechimuthu
... Petitioner

Vs.

1. The State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St. George, CHENNAI - 600 009.

2. The Director of Medical Education, No.162, Periyar EVR High Road, Kilpauk, CHENNAI - 600 010.

3. The Selection Committee, The Director of Medical Education, No.162, Periyar EVR High Road, Kilpauk, CHENNAI - 600 010.

4. Minor Sumitha 5. Minor C. Socrates 6. Minor G. Kalyani 7. Minor K. Majnu 8. Minor D. Kanimozhi 9. Minor Satish Kumar 10. Minor V. Barathvajan ... Respondents

Prayer: Petition filed under Article 226 of Constitution of India for the issuance of a Writ of Declaration for the reasons as stated therein.

W.P. No.33272 of 2002

V. Divyakala ... Petitioner

Vs.

1. The State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St. George, CHENNAI - 600 009.

2. The Secretary, Selection Committee, The Director of Medical Education, No.162, Periyar EVR High Road, Kilpauk, CHENNAI - 600 010. ... Respondents

Prayer: Petition filed under Article 226 of Constitution of India for the issuance of a Writ of Certiorarified Mandamus for the reasons as stated therein.

!For Appellant in W.A. No.3221 : Mr. R. Gandhi, Sr. Counsel of 2002 for Mr. R.G. Narendhiran

For Petitioners in W.P. Nos.23615 : Mr. V. Prakash and 23616 of 2002

For Petitioner in W.P. No.33272 : Mr. C. Selvaraju of 2002

^For Respondents 1 to 3 in all the : Mr. N.R. Chandran, matters Advocate General, assisted by Mr. V. Raghupathi, Govt. Pleader in W.A. No.3221 of 2002 and Mr. V.R. Rajasekaran, Spl. Govt. Pleader in Writ Petitions.

For 4th Respondent in W.P. No. : Mr. V. Bhiman 23616 of 2002

For 5th Respondent in W.P. No. : Mr. K. Chandru, Sr. Counsel, 23616 of 2002 for Mr. T.R. Ravi

For Respondents 6 to 9 in W.P. No. : Mr. V.K. Vijayaraghavan 23616 of 2002

For 6th Respondent in W.P. No.23616 : Mr. S. Sathyamoorthy of 2002

:J U D G M E N T

THE HONOURABLE THE CHIEF JUSTICE (For himself and V.S.S.J., P.D.D.J and C.N.J.,)

This Writ Appeal and Writ Petitions raise an important question relating to the entitlement of separate reservation for the children of inter-caste marriage under special category other than the reserved categories.

2. W.A. No.3221 of 2002 arises out of the judgment rendered on 3.9.2002 in W.P. No.33838 of 2002. Because of the stay granted by a Division Bench of this Court in W.P. No.23616 of 2002, no relief could be granted by the learned single Judge and the writ appeal has been filed.

3. Ms. P. Sakthipriya, a minor represented by her father and natural guardian Pechimuthu, has filed W.P. Nos.23615 and 23616 of 2002.

(a) In W.P. No.23615 of 2002, the prayer is to declare that Item 10 of clause 4.4. of the Prospectus for Admission into B.E./B.Tech/B.Arch course is to be interpreted as meaning equal opportunity for the various categories mentioned therein and preferen e to be given when marks are equal on the basis of merit consequent to such direction, direct the respondents to consider the petitioner's case based on such interpretation and issue such further or other orders or directions as this Court may deem fit. (b) In W.P. No.23616 of 2002, the relief sought for is to declare that sub-clause (viii) of Clause 13 of the Prospectus for Admission into M.B.B.S./B.D.S course is to be interpreted as meaning equal opportunity for the various categories mention in and preference to be given when marks are equal on the basis of merit consequent to such direction, direct the respondents to consider the petitioner's case based on such interpretation and issue such further or other orders or directions as this Cour t may deem fit. 4. In W.P. No.33272 of 2002, the relief sought for is to issue Writ of Certiorarified Mandamus calling for the records pertaining to the Prospectus of M.B.B.S./B.D.S. Admissions 2002 - 2003 of the second respondent and quash the Clause (viii) o and direct the respondents to select the petitioner under the Special Category for the children of inter-caste marriage people without any order of preference and on merits.

5. (a) W.P.M.P. No.46329 of 2002 in W.P. No.23616 of 2002, has been filed by one C. Socrates seeking impleadment and the same was ordered on 5.8.2002.

(b) W.P. M.P. No. 50036 of 2002 in W.P. No.23616 of 2002 has been filed by one Sumitha seeking impleadment and the same was ordered on 5.9.2002.

(c) W.P.M.P. No.55683 of 2002 in W.P. No.23616 of 2002, has been filed by one V. Barathvajan seeking impleadment and the same was ordered on 31.10.2002.

(d) W.P.M.P. No.59679 of 2002 in W.P. No.23616 of 2002, has been filed by G. Kalyani, K. Majnu, D. Kanimozhi and Satish Kumar seeking impleadment and the same was ordered on 31.10.2002.

6. By order dated 3.7.2002, an injunction has been granted regarding the selection on the basis of preferential reservation pursuant to Item (viii) of Clause 13 of Prospectus of Tamil Nadu M.B.B.S./B.D.S. Admission 2002 - 2003 as also regardin imilar provision relating to Engineering admissions. Petitions to vacate the same have been filed and they came up for hearing on 26.9.2002. But the injunction order was not vacated. Learned Government Pleader brought to the notice of the Court the de cision rendered by a Division Bench of this Court in S. HARI GANESH v. STATE OF TAMIL NADU (AIR 1987 Madras 55) and a Full Bench of this Court in M. SONA RAJAN v. STATE OF TAMIL NADU (1999 (II) CTC 1) and submitted that the matter is no more res integra in view of the aforementioned decisions and that the writ petitions are liable to be dismissed as being covered by the aforesaid decisions. Learned counsel for the petitioners submitted that the ratio laid down in the said decisions is incorrect and the same need to be reconsidered. A Full Bench judgment in MINOR S. MUTHU SENTHIL v. STATE OF TAMIL NADU (2002 (1) C.T.C. 385) was also brought to the notice of the Court, which dealt with a

matter of reservation traceable to Article 15 (4) of the Indian C onstitution. As such, the matter has been referred to a Larger Bench of 5 Judges by order dated 26.9.2002. On 23.10.2002, W.A. No.3221 of 2002 has been filed and Mr. R. Gandhi, learned senior counsel for the appellant, submitted that the matter require s expeditious disposal as the admissions to other categories has already been completed and that the courses have to start and any loss of time would result in irreparable injury to the students. Therefore, a Larger Bench was constituted and the matter was heard on 30.10.2002 and 31.10.2002.

7. In order to avoid confusion and duplication, we refer the parties as indicated below. We are not mentioning the respondents in W.P. No.23615 of 2002 as Mr. V. Prakash, learned counsel for the petitioner, has withdrawn the writ petition on t that the petitioner has opted to have admission into medical course and not engineering course. M. Aarthi : First Petitioner P. Sakthi Priya : Second Petitioner V. Divyakala : Third

Petitioner State of Tamil Nadu, rep. by the : First Respondent Secretary to Government, Health & Family Department, Chennai.

The Director of Medical Education : Second Respondent

The Selection Committee, : Third Respondent The Director of Medical Education

S. Sumitha : Fourth Respondent C. Socrates : Fifth Respondent G. Kalyani : Sixth Respondent K. Majnu : Seventh Respondent D. Kanimozhi : Eighth Respondent Satish Kumar : Ninth Respondent V. Barathvajan : Tenth Respondent

8. In the Entrance Examination, out of 300 marks, the petitioners 1 to 3 and the respondents 4 to 10 have obtained the following marks: First Petitioner : 267.35 Second Petitioner : 233.14 Third Petitioner : 279.47 Fourth Respondent : 244.50 Fifth Respondent : 262.13 Sixth Respondent : 279.24 Seventh Respondent : 279.29 Eighth Respondent : 255.85 Ninth Respondent : 271.65 Tenth Respondent : 224.52

9. The last marks (cut off marks) obtained by the students opting for M.B.B.S. course in OC/BC/MBC/SC/ST categories are as follows:

Government IRT Free Payment OC 295.20 293.88 293.84 292.86 BC 293.77 293.69 293.52

MBC 291.61 291.40 291.19

SC 285.47 285.22 284.68

ST 273.01 278.31 276.80

It is not in dispute that neither the petitioners nor the respondents 4 to 10 could get a seat in M.B.B.S. course for the year 2002 - 2003 as the marks

obtained by them are far below the cut off marks obtained by the above categories. That is why, they fell back upon Clause 13 (viii) of the Prospectus, which reads, 13. SEATS RESERVED FOR SPECIAL CATEGORIES IN GOVERNMENT COLLEGES:

(viii) SEATS RESERVED FOR CHILDREN BORN OF INTER-CASTE MARRIAGE

NO. OF SEATS RESERVED IN M.B.B.S. - 12

The following order of preference shall be followed for selection of candidates from this category based on merit:

(a) The children born of intercaste Marriage between SC/ST and Forward Community (b) The children born of intercaste Marriage between SC/ST and Backward Community (c) The children born of intercaste Marriage between SC/ST and MBC and Denotified Communities.

The castes of parents of the respective petitioners and respondents 4 to 10 and the categories they fall into, are mentioned infra:

Father Mother Category

1st Petitioner S.C. F.C. (a) 2nd Petitioner S.C. B.C. (b) 3rd Petitioner S.C. M.B.C. (c) 4th Respondent F.C. S.C. (a) 5th Respondent S.C. F.C. (a) 6th Respondent F.C. S.C. (a) 7th Respondent S.C. F.C. (a) 8th Respondent S.C. F.C. (a) 9th Respondent F.C. S.C. (a) 10th Respondent S.C. F.C. (a)

10. Mr. V. Prakash, learned counsel appearing for the second petitioner, led the arguments. He submits that 12 seats in Medical Course were carved out as a special category for the children born of inter-caste marriages and once the students come withi that category, there cannot be further categorisation and that all the children of inter-caste marriages opted under the special category are entitled to be selected in accordance with the marks and not on the basis of any preference. He further submit s that there is no intelligible differentia for giving preference to one category over the other and such categorisation infracts equality and equal protection clauses enshrined in Article 14 of Indian Constitution. According to the learned counsel, the special reservation is not traceable to sub-Article (4) of Article 15 of the Indian Constitution. He submits that the reservation is horizontal. Mr. C. Selvaraj, the learned counsel for the third petitioner, supports the said arguments.

11. Mr. N.R. Chandran, learned Advocate General appearing for the State, counters the petitioners' arguments on the ground of existence of intelligible differentia for giving preference. According to the learned Advocate General, the degree of d varies from (a) category and (b) category and from (b) category to (c) category and it is higher in (a) category and narrows down in (b) category and further narrows down in (c) category and that forms the nexus for differentiation and preferential treat ment. The learned Advocate General

further submits that the State is entitled to identify the special categories under Article 162 read with Entry 25 of List III of Schedule 7 of Indian Constitution and that such power flows from Article 15 (1) of the I ndian Constitution and the criteria for the special reservation is not based on caste but on merit and to encourage the inter-caste marriages. Mr. R. Gandhi, learned senior counsel appearing for the first petitioner, supports the stand taken by the lear ned Advocate General.

12. Mr. K. Chandru, the learned senior counsel appearing for the fifth respondent, submits that the very reference to Five-Judges Bench is bad as the matter ought to first be referred to Three-Judges Bench and only if the Three-Judges Bench opin t was a matter to be decided by a Five-Judges Bench, then a reference ought to be made to a Five-Judges Bench. He also submits that a Special Leave Petition has been filed before the Supreme Court assailing the order of reference and that is likely to b e listed on 1.11.2002.

13. We are unable to accede to the submission of Mr. K. Chandru, learned senior counsel, as the reference order was passed on 26.9.2002 and no objection has been raised by anybody. Even at the start of the arguments on 30.10.2002, no objection ed and arguments went on on 30.10.2002 and on 31.10.2002. Only towards the end of the day and on the verge of closure of the arguments, the above argument has been raised. Further, education matters like this cannot brook any delay. Admissions to all other categories of Medicine have been completed on 30.09.2002 and the classes have begun. Only 12 seats under this category had to be filled up and responding to the urgency and at the cost of the other work, this Larger Bench has been constituted. In the circumstances, in our considered view, there is no legal impediment to dispose of this matter without any loss of time.

14. Mr. Chandru, learned senior counsel, then proceeds with his arguments and submits that there is no lis present so as to adjudicate whether reservation is traceable to Article 15 (1) or Article 15 (4) of the Constitution and the entire discus only academic for nobody has assailed the validity of the special reservation and what is being fought for is only the preferential treatment. He further submits that the special category reservation is outside the purview of Article 15 and for that rea son, even Article 14 and this springs out of Preamble to the Indian Constitution read with Article 38 (2) and Entry 25 of List III of Schedule 7 of the Indian Constitution. He reiterates the stand taken by the learned Advocate General that the State is entitled to carve out a special reservation of this nature as a part of the caste eradication scheme and the special treatment is protected under the theory of 'compensatory discrimination' akin to compassionate appointment and that as Tamil Nadu Act 45 of 1994 does not provide for this kind of special reservation, the State has rightly invoked its executive power under Article 162 of Indian Constitution.

15. Mr. V. Bhiman, learned counsel for the fourth respondent, Mr. V.K. Vijayaraghavan, learned counsel for the respondents 6 to 9 and Mr.Sathyamoorthy, learned counsel appearing for the tenth respondent, adopt the above arguments of Mr. Chandru, learned senior counsel.

16. The contention that there is no lis pending for adjudication is unacceptable. The bone of contention is for admission into medical course, 12 seats have been specially earmarked for promotion of inter-caste marriages and that forms a specia ry of reservation. But the writ petitioners 2 and 3 contend that there cannot be any preferences while applying the special reservation. Then consideration goes to the roots of the matter as to whether special reservation pleaded really exists and fits in our Constitutional scheme. When the equal treatment is the rule and the reservation is an exception, it is fundamental that foundation should be laid relating to power to carve out such an exception and that such power has been validly exercised and thus burden lies on the persons or the State pleading for the same. The preferential treatment arises only when special category reservation exists and when it does not exist, the entire thing falls to ground. Now, we proceed to examine the prime cont ention that the special reservation of this kind is not a reservation flowing from Article 15 (4) but is traceable to Article 15 (1) as contended by some learned counsel mentioned above and the extreme contention of Mr. K. Chandru, learned senior counsel , that this special reservation is not relatable either to Article 15 or Article 14 of Indian Constitution but is directly traceable to the Preamble of the Constitution as part of caste eradication policy in furtherance of social justice.

17. In HARI GANESH's case (cited supra) and SONA RAJAN's case (cited supra), the judgments were rendered on the premise that there is a special reservation provided by the State and the only aspect considered was the validity of the discrimina giving preferential treatment between categories (a), (b) and (c) on the touchstone of Article 14 of Indian Constitution. Article 15 was never considered. While Article 14 enshrines general right of equality, Articles 15 and 16 of Indian Constitution d eal with specific rights of equality. Admission to educational institutions is the one specifically covered by Article 15. Exception to equal treatment under Article 15 has been carved out by incorporating sub-Article (4) by the Constitution (First Ame ndment) Act, 1961, which was necessitated because of the judgment of the Supreme Court in STATE OF MADRAS v. CHAMPAKAM DORAIRAJAN (AIR 1951 S.C. 226). Article 15 (4) protects the reservation for admissions to educational institutions if any order is pas sed by the State for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. The prime consideration is whether the special reservation in the instant case is traceable to above Ar ticle 15 (4) and if so traceable, whether the power is exhausted by reason of enactment of Tamil Nadu Act 45 of 1994.

18. It is too late in a day to say that no reservations of any kind can be provided, be it admission to educational institutions under Article 15 or in public appointments under Article 16 of Indian Constitution. Plethora of precedents have bee by the learned counsel appearing in the matter but we find that the matter is squarely covered by the legal principles enunciated by a majority judgment in INDRA SAWHNEY v. UNION OF INDIA (AIR 1993 S.C. 477). Surveying the entire case law on the subject relating to public employment and reservations thereto under Article 16 and also touching upon Article 15, it was authoritatively held that once the State carves out an exception of social reservation, the power is exhausted and no further social reserv ation can be

resorted to. What is applicable to Article 16 (4) is equally applicable to Article 15 (4). In fact, nobody disputes this. While approving the provision relating to reservations, the Supreme Court in INDRA SAWHNEY's case (cited supra) hel d that reservations cannot exceed 50% and necessarily 50% has to be set apart for Open Category on the basis of merit and only in exceptional circumstances, can the rule of this 50% maximum limit be relaxed but heavy burden lies upon the State to justify such reservation in excess of 50%. Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1994) provide 69% reservation leaving only 31% to Open Category. Allocation of seats in educational institutions is provided as under: OC 31% BC 30% MBC & Denotified Communities 20% SC 18% ST 1%

The validity of this Act is under challenge before the Supreme Court. Therefore, our consideration is confined only to the aspects other than the validity of the above enactment. In tune with Tamil Nadu Act 45 of 1994, the Prospectus provides the rule of reservation in sub-clause (9) of Clause 8, which reads, (9) The rule of reservation: Open Competition 31% Backward Classes 30% Most Backward Classes/Denotified Communities 20% Scheduled Castes 18% Scheduled Tribes 1%

19. The executive power of the State under Article 162 of the Constitution is co-extensive with the legislative power and when the field of law is occupied by a legislative Act, the exercise of executive power is not available. There is no dispute abou the State's power to provide reservation even by executive order under Article 162 of Indian Constitution. But such power can be exercised only in the absence of a legislative Act. Of course, if an aspect is not covered by the legislative Act, then th e executive power can be resorted to. To put it precisely, if the power of reservation is exhausted under Tamil Nadu Act 45 of 1994, then no power exists to invoke the executive power under Article 162 of the Constitution. The special reservation, whic h has been provided for the children born of inter-caste marriage is one traceable to Article 15 (4) on the ground of social and educational backwardness. That power has already been exhausted by the State by enacting the Tamil Nadu Act 45 of 1994. We are unable to accede to the contention that the special reservation provided for the children of inter-caste marriage is not traceable to Article 15 (4) but to Article 15 (1) or Article 14 or Preamble of the Constitution. The very basis of reservation for inter-caste children is based on their social and educational backwardness and is only traceable to Article 15 (4) and when the State had already exhausted that power of reservation by enacting Act 45 of 1994, there is no other reason for invocation of Article 162 of the Constitution. In fact, the State did not even invoke such power under Article 162 of the Constitution, obviously, for the reason of its exhaustion of power under Tamil Nadu Act 45 of 1994. A reading of G.O. Ms.No.477, Social Welfa re Department, dated 27.6.1975, on the basis of which this special reservation for the children born of inter-caste marriage has been provided, makes it clear that the State did not venture to carve out any special reservation as pleaded by the parties. In fact, this was never taken note of in HARI GANESH's case (cited supra) or SONA RAJAN's case (cited supra). We feel it apt to extract the same.: SOCIAL

WELFARE DEPARTMENT G.O.Ms.No.477 Dated: 27.06.1975 ORDER:- The Government have been extending certain concessions to the members of Scheduled Tribes, Scheduled Castes and Backward Classes from time to time. A question has arisen about the determination of the community of the children born of inter-caste m ages.

2. The Government after carefully examining the question, direct that the children born of inter-caste marriages, that is marriages -

(i) between a person of a Scheduled Tribe and another of a Scheduled Caste or Backward Class or Forward Class; (ii) between a person of a Scheduled Caste and another of a Backward Class or Forward Class; and (iii) between a person of a Backward Class and of a Forward Class

shall be considered to belong to either the community of the father or the community of the mother according to the declaration of the parents regarding the way of life in which the children are brought up and that the declaration in respect of one child will apply to all children.

The above Governmental Order wants to clear the confusion of the status of the children born of inter-caste marriage stating that they can adopt the caste of either of their parents and as they are brought up by their parents. Admittedly, the petitioner s 1 to 3 as also respondents 4 to 10 have been brought up as Scheduled Castes and pursuant to the above Government Order, they obtained certificates to the effect that they belong to Scheduled Castes community and necessarily, they have to only fall with in the category of Scheduled Castes and competing within 18% allocated to them. 12 seats reserved in M.B.B.S. under sub-clause (viii) of Clause 13 of the Prospectus leads them nowhere and in fact, it has got no Constitutional or legal basis. It is not out of place to mention that 71 seats have been carved out and separated from the computation of 1255 seats in Medicine and only 1184 seats have been computed for the purpose of applying the categories of reservation conforming to 69% and 31% in OC categ ory. This is clearly illegal and unconstitutional. The judgment rendered by the Supreme Court in ANIL KUMAR GUPTA v. STATE OF U.P. (1995) 5 S.C.C. 173) is an authority for this proposition. Reservations of several kinds like widows, deserted women an d any candidate, whose parent has suffered for the cause of development of Tamil and contributed towards the protection etc., are quite untenable. They do not have any constitutional or legal sanction. But we are not dwelling on that as they have not b een questioned here and as the admissions to that category have already been completed. Other than the reservation in Tamil Nadu Act 45 of 1994, what is permissible is only for Physically Handicapped, Eminent Sportsmen, children of freedom fighters and Children of Ex-servicemen being horizontal reservation and not vertical. The State has to bear this in mind in future.

20. In view of what is stated supra, we hold that the allocation of 12 seats for children of inter-caste marriage is unconstitutional and is set aside. The said 12 seats shall now be distributed among the candidates belonging to OC, BC, MBC/Den Communities and SC/ST in ratio of 31%, 30%, 20%, 18% and 1% respectively and in computing so, the 12 seats, which remain unfilled, shall

go to the respective categories as mentioned below:

OC 4 BC 3 MBC/Denotified Communities 2 SC 2 ST 1

- 12 --

We direct that the above process shall be completed on or before 8.11.2002.

The Writ Appeal and the Writ Petitions are disposed of accordingly. Consequently, connected miscellaneous petitions are closed.

(B.S.R., CJ) (V.S.S., J) (P.D.D., J) (C.N., J) 1.11.2002 bh/

Internet : Yes

LR Entry : Yes

To

1. The State of Tamil Nadu, rep. by its Secretary to Government, Health & Family Welfare Department, Fort St. George, CHENNAI - 600 009.

2. The Director of Medical Education, No.162, Periyar EVR High Road, Kilpauk, CHENNAI - 600 010.

3. The Selection Committee, The Director of Medical Education, No.162, Periyar EVR High Road, Kilpauk, CHENNAI - 600 010.

4. The Secretary, Tamil Nadu Engineering Admissions, 2002 Anna University, CHENNAI - 600 025.

5. Government of Tamil Nadu, rep. by its Secretary, Dept. of Education, Fort St. George, CHENNAI - 600 009.

Writ Appeal No.3221 of 2002 and
Writ Petitions No.23615, 23616 & 33272 of 2002

R.Jayasimha Babu, J.

The writ petitioners, the persons impleaded as respondents in one of the writ petitions, as also the appellant in the writ appeal are students who have applied for admission to MBBS course for the academic year 2002-03 against 12 seats reserved in t overnment medical colleges for 'children born of inter-caste marriage'. The title given to the special category is misleading. The reservation provided under that category is confined to the children of spouses, one of whom belongs to the scheduled ca ste or scheduled

tribe. Among them preference is provided for depending upon the caste status of the other spouse. Reservation of 12 seats for this special category has been in vogue for well over 17 years.

2. A Division Bench of this Court in the case of Hari Ganesh vs. State of Tamil Nadu decided on 03.01.1986, AIR 1987 Mad 55 noticed the special categories provided for admission to the medical course for the academic year 1985-86. The eight sub c ories which had been provided for in that year were – (i) physically handicapped; (ii) widows; (iii) eminent sportsmen; (iv) children born of inter-caste marriage in the order of preference mentioned in that clause; (v) defence quota; (vi) childre n of freedom fighters; (vii) Tamil language candidate whose parent/parents has/have suffered for the cause of development of Tamil and contributed towards the protection of Tamil; and (viii) For orphans from orphanages approved and aided by State Go vernment. The total number of seats so reserved for those eight special categories was 48 in that year. For the academic year 2002-03 there are 15 special categories and the total number of seats reserved for those 15 special categories is 71.

3. None of the parties before the Court have questioned the validity of the special category of 'children born of inter-caste marriage' as indeed they cannot, as all of them seek admission only under that category. Special category seats are allo only after filling up the seats under the categories of open competition, backward classes, most backward classes and denotified tribes, scheduled castes and scheduled tribes.

4. The validity of the order of preference provided for under the special category had been questioned before this Court 16 years ago in the case of Hari Ganesh vs. State of Tamil Nadu, AIR 1987 Mad 55. The Division Bench upheld that order of pref ce and found the classification to be one of which did not offend Article 14 and which advanced directive principle of the State policy in Article 46. The Court also went into the question as to whether the State can reserve certain number of seats for special category though the same had not been raised and held that reservation for this special category was "perfectly in accordance with law and does not offend the constitutional provision in any manner".

5. About 13 years after that judgment, the matter again received the attention of this Court, this time by a larger Bench of three Judges in the case of M.Sona Rajan vs. The State of Tamil Nadu, 1999 (II) CTC 1. It had been submitted by all the par to the case that an authoritative pronouncement of this Court was necessary as the same issue kept coming up year after year and therefore the Court should consider the question, even though by the time the case was heard, the academic year had come to an end. The Court thereafter proceeded to consider the case on merits. The Court considered the reasoning given by the earlier Division Bench in the case of Hari Ganesh and held that "....we fully agree with the reasoning given in the said decision an d, we answer the reference in the negative. The decision rendered in Hari Ganesh's case, AIR 1987 Mad 55 stands approved".

6. It is, therefore, clear that the special category of 'children

born of inter-caste marriage', provided for in the prospectus for the academic year 2002-03 issued by the Directorate of Medical Education of the State Government, is fully in accord with the decision of the Division Bench in the case of Hari Ganesh and the decision of the Full Bench of this Court in the case of Sona Rajan, which decisions are undoubtedly binding on the State as also on the applicants seeking admission to the course .

7. The last date for applying for admission to the course, as set out in the prospectus, was 10.06.2002. The prospectus sets out that as required by the M.G.R. Medical University to which all the medical colleges in the State are affiliated, the ire admission process should be completed before 30.09.2002. Candidates are required to have appeared for the Tamil Nadu Professional Courses Entrance Examination which had been held prior to June, 2002. Admission to the course is to be on merit su bject to the reservation for various categories as adjudged by taking the weighted total marks in the plus two examination for a maximum of 200 and adding thereto the marks obtained by the candidate in the professional course entrance examination in the physical and biological sciences for a maximum of 100.

8. The learned Advocate General has submitted at the Bar that for the academic year 2002-03 the total number of seats is 1255 in 11 Government medical colleges, one medical college run by Institute of Road Transport through a society, and two s financing colleges excluding the fifteen per cent NRI/management seats in those self financing colleges. 71 seats are first earmarked in the Government medical colleges for the 15 special categories. The remaining 1184 seats are allotted subject to mer it within each category to 31 per cent open competition, 30 per cent backward classes, 20 per cent most backward classes/denotified communities, 18 per cent scheduled castes and one percent to scheduled tribes.

9. Candidates seeking admission to the special category seats are eligible for consideration under the open category as also under the aforementioned social reservation categories. By the G.O. Ms.No.477, Social Welfare Department, dated 27.6.19 hildren born of inter-caste marriages are, depending on the declaration made by the parents regarding the way of life in which the children are brought up, allowed to claim the caste status of their father or mother. It may be noticed here that all th e students who are parties to the matters before us have obtained caste certificates that they belong to scheduled caste.

10. Two of the three writ petitions before us came to be filed on the first of July, 2002 and the third, on 12th of August, 2002. An interim order was made on 3rd of July, 2002 by which students who were entitled to be granted admission in terms he prospectus and in accordance with the decision of the Full Bench which was the prevailing law, were kept out of admission process.

11. The writ petitions were referred to a Bench of five Judges on 26.09.2002. In the order of reference, after noticing the submission that the matters were squarely covered by the decisions of Hari Ganesh, AIR 1987 Mad.

55 and Son Rajan, 1999 (II C 1, it is stated, "But in view of the later full Bench judgment reported in 2002 (1) CTC 385 (Minor S.Muthu Senthil vs. State of Tamil Nadu) the matters need to be resolved by a larger Bench of five Judges."

12. The case of Muthu Senthil, 2002 (I) CTC 385 concerns reservation for rural students in admissions to medical colleges in the State which was 15 per cent till 06.06.2001 on which date it was increased to 25 per cent. As noticed by the Court in t judgment, "In some matters, only the escalation of special reservation from 15% to 25% is challenged while in other cases, the scheme of special reservation itself is under challenge." Though the scheme of special reservation was referred to, what wa s examined by the Court was only the reservation provided for the rural students and not reservation provided for other categories. The Court held that the rural reservation cannot sustain under Article 15(4) of the Indian Constitution. After examini ng that reservation under the touchstone of Article 14, the Full Bench held that, "..the Rural reservation provided at first with 15% and then extending to 25% for admission in professional colleges in the State of Tamil Nadu, by issuance of the impugne d Government orders by the Government, has got absolutely no nexus to the object to be achieved and there is no intelligible differentia either and that the Government has failed to justify the discrimination and as such they are invalid being infractive of Article 14 of Indian Constitution and are hereby set aside."

13. The decisions of the two Full Benches in the case of Sona Rajan and in the case of Muthu Senthil are in no way conflicting as the category of reservation considered in the two cases were different.

14. Courts of law are not to clutch at jurisdiction and embark on adjudication when the issue sought to be adjudicated has not even been raised by the parties before the Court. The Supreme Court in the case of Swati Gupta vs. State of UP, (1995) C 560 while considering the extent and the manner in which reservation had been made for admission to medical colleges in UP, declined to go into the question of the validity of the reservation by observing, "Whether the reservation for such persons shou ld have been made or not was not challenged, therefore, this Court is not required to examine it."

15. The later Division Bench of the apex Court in the case of Anil Kumar Gupta vs. State of UP, (1995) 5 SCC 173 at paragraph 7 of the judgment noticed, "...a glaring illegality which has unfortunately not been raised in these writ petitions but is f-evident from the decisions of this Court" which had occurred by reason of the State violating the law which had been declared by the apex Court in an earlier decision in the case of State of UP vs. Pradid Tandon, (1975) 1 SCC 267 which had held that " the people in hill and in Uttarakhand are socially and educationally backward classes of citizens". The State, notwithstanding that declaration by the apex Court, having treated that people in hill and Uttarakhand areas as a special category under Arti cle 15(1), the Court pointed out that illegality to the State and directed the State to keep the same in mind for future selections as also in respect of those which may then be under way and make necessary corrections.

16. Here, there is evidently no illegality, much less a 'glaring' illegality, as the Full Bench decision of this Court in the case of Sona Rajan, 1999 (II) CTC 1 was binding on the State and the State can by no means be regarded as having acted ill ly in following the binding judgment of this Court.

17. Whatever may be said about the correctness or otherwise of the judgment of the Full Bench in the case of Sona Rajan, for the academic year 2002-03 the special category for 'children born of inter-caste marriages' was a valid special category ev s the other special categories which have not been challenged before us, many of which are in terms of their legal validity, not very different from the category of children of special marriages, are valid categories for which admissions have been made. The interim order made by this Court disabling the State from admitting the students of this category at a time when admission process had progressed to the stage of allocating the students under the special categories to Government medical colleges, s hould not prejudice the students under this category from obtaining admission in this year. It is not the fault of the students that the special category was provided for in the prospectus for this year. The State cannot be faulted for continuing tha t category as the same had been upheld as long back as sixteen years earlier and that decision had been reaffirmed by a Full Bench of this Court as recently as in the year 1999. Hope and expectation of securing admission under this category had been l egitimately roused among the applicants under this category by reason of the authoritative and binding decision of this Court in the case of Sona Rajan.

18. It is axiomatic that acts of Courts should not prejudice anyone. The impleaded parties and the appellant in the writ appeal are persons who are waiting to be admitted and who are prima facie, entitled to admission having regard to the admit fact that they belong to this special category and that their ranking in the merit list in this category is sufficiently high to enable them to secure admission. They have been kept out of the colleges on account of the interim order, even at a time whe n the admission of other categories have been completed and classes commenced sometime back. There is no justification whatever for preventing them from joining the course forthwith.

19. The order of preference provided in the special category has been considered and upheld by the Full Bench in the case of Sona Rajan and what has been held therein should govern the admissions for the current academic year for which process of ission has begun and almost reached the conclusion, on the strength of the judgment of the Full Bench of this Court in the case of Sona Rajan.

20. There are 15 special categories listed in the prospectus. Those categories and the number of seats allotted to them are - (i) Three seats for Children/Grand Children of Freedom Fighters; (ii) six seats reserved for Children whose parents ed for enrichment, propagation and development of Tamil language and made significant contribution to Tamil Society, culture and literature; (iii) six seats for Service Personnel Killed action, Ex

servicemen, and Serving Defence Personnel, two each a nd one seat for BDS course; (iv) two seats for children of Police personnel who died in heroic action; (v) three seats for eminent sportsmen; (vi) five seats for widows; (vii) one seat for deserted women; (viii) 12 seats for children born of inter-caste marriage; (ix) three seats for physically handicapped; (x) two seats for orphans; (xi) three seats reserved for children of medical department staff who lost their lives on account of infection, radiation and chemical reaction due to occupational hazard s in Government hospitals; (xii) two seats reserved for recipients of Anna Award who are disabled in the act of valor; (xiii) two seats for National Cadet Corps; (xiv) one seat for candidates of Tamil Nadu origin settled in Andaman and Nicobar Island; a nd (xv) 20 seats for Sri Lankan Tamil among Srilankan refugees students, repatriates not being eligible.

21. The aggregate of seats so reserved for these 15 categories, some of which have sub-categories, is 71. As a percentage of the total number of 1255 seats the seats reserved for the special categories works out to 5.6 per cent.

22. The manner in which the State has calculated the number of seats reserved for backward classes and the scheduled castes and tribes was not a matter in issue before us. There is no pleading with regard thereto and none of the petitioners have sed that issue. The State clearly has had no opportunity to deal with the same. None of the petitioners addressed any argument on that question. It is, therefore, wholly inappropriate and beyond the scope of the matter before us to pronounce upon th e validity of the manner in which calculation has been made by the State.

23. Of the 15 special categories the only category with which we are concerned in the matter before us is "children born of inter-caste marriage'. The validity or otherwise of the other special categories, some of which, as noticed earlier, have b in existence for over 17 years, has not been debated before us. There is no pleading with reference thereto. The State was never called upon nor did it have any opportunity to justify the creation of the special category. That special categories can b e created under Article 15(1), even as it can be under Article 16(1), is settled law having regard to the pronouncement of the Supreme Court in the case of Indra Sawhney vs. Union of India, AIR 1993 SC 477 and in the case of Anil Kumar Gupta vs. State of UP, (1995) 5 SCC 173.

24. The Supreme Court, in the case of Anil Kumar Gupta, (1995) 5 SCC 173 reiterated what had been said by the majority of the Nine Judge Bench in the case of Indra Sawhney with regard to Article 16(1) and held the same to be applicable to Article) and (4) as well. The words of caution with regard to creation of special categories set out in the judgment of majority in the case of Indra Sawhney are, " But at the same time one thing is clear. It is in a very exceptional situation given -- and not for all sundry reasons – that any further reservations of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress the specific situation. The very presence of clause (4) should act as a damper upon the

propensity to create further classes deserving special treatment. The reaso n for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do." The Court in Anil Kumar's case, after setting out these words of caution, has held that "Though the said observations were made with reference to clauses (1) and (4) of Article 16, the same apply with equal force to clauses (1) and (4) of Article 15 as w ell."

25. The creation and the validity of any special category under Article 15(1) has therefore to be decided with reference to the justification offered by the State for such special category in terms of public interest and the need to redress the spe c situation.

26. None of the parties before us have raised, by way of pleading, prayer, written or oral submission, any question regarding any of the other special categories. The State was not called upon to meet any case with regard to the validity of those egories. The Court, therefore, should not be make any pronouncement with regard to the validity of those categories. The validity of those categories will require consideration only as and when the provision made for such categories is challenged an d such challenge comes up properly before the Court for consideration.

27. What has been said so far is sufficient to dispose off the matters before us. However, as counsel did address us on the special category of 'children of inter-caste marriage' though with regard to interpretation and not on the validity of the gory, that category having come to our notice specifically in this case, it would not be inappropriate to express one's view on the validity of that category for future guidance of the State without in any manner affecting the provision made for this aca demic year.

28. There can be no doubt whatsoever that inter-caste marriages break down caste barriers more effectively than any other step that may be adopted for eradicating casteism. If the members of all castes enter the melting pot by contracting matrimo ith persons belonging to other castes without any limitation, over a period of time, it is bound to dilute caste considerations to a point of extinction. That will go a long way to bring about equality among all sections of community. The State cert ainly can adopt appropriate measures to encourage such inter-caste marriages and offer incentives therefor. That would be in tune with the objectives of the preamble and the directive principles of State policy.

29. The question which requires consideration is whether inter-caste marriages where one of the spouses belongs to scheduled caste/tribe can be regarded as a category apart from the schedule caste or the class to which the other spouse belongs. The t has given to the parents of such children the option to choose the caste of the father or of the mother for their children. All the students before us have obtained caste certificates to the effect that they belong to scheduled castes. They have the opportunity to compete with the other students belonging to the scheduled caste for the seats reserved for

scheduled castes. In addition, they are entitled to compete for the seats in the open competition category.

30. The additional provision for the children of the parents, one of whom belongs to the scheduled caste is, in effect, an addition to the reservation already made for the scheduled caste and other classes and is traceable not to Article 15(1), wh permits reasonable classification, but to Article 15(4) which enables the State to make special provisions for the socially and educationally backward classes, scheduled castes and scheduled tribes. It is only in cases where the other spouse does not be long to any of these classes, that the child is disabled from competing within the reservation made for those classes, in the event of the parents opting to treat the child as belonging to forward community and not the scheduled caste. It has been held by the majority in the case of Indra Sawhney with reference to Article 16(4) which is substantially similar to Article 15(4) that Article 16(4) is "exhaustive of all the reservations that can be made in favour of backward class of citizens."

31. Once it is found that the special category is one which emanates from and is directly linked to the backward classes or scheduled caste or scheduled tribes, such reservation must be regarded as having been made under Article 15(4) and not under icle 15(1). Reservation in favour of Refugees, the children of Army Personnel or Freedom Fighters, the physically handicapped, orphans coming from State or private orphanages can only be under Article 15(1) and not under Article 15(4). Sawant, J., in h is judgment in the case of Indra Sawhney cited the physically handicapped, the children of Army Personnel and project affected persons, etc. as examples of classes which can be created under Article 16(1). The same position would prevail under Article 1 5(1) as well.

32. If the category of children born of inter-caste marriage is traceable to Article 15(4), having regard to the fact that the State of Tamil Nadu has already exercised it's legislative power in the field by enacting Act 45 of 1994, the executive p of the State would no longer be available to create additional special category or to add to the quantum of reservation provided for in any of the classes covered by Article 15(4).

33. The petitioners in the writ petitions are not entitled to any relief. What has been observed in the preceding paragraphs with regard to the justification or otherwise and the validity or otherwise of the special category of children of inter-ca marriages is a matter which the State should take note of for the future as that view has been expressed only having regard to the nature of the illegality that has been brought to our notice during the course of examination of the petitions which we hav e heard. It is not proper for a Court to strike down or set aside the provision in any statute rule or order, the validity of which had not been put in issue before the Court and such provisions are not to be set at naught by a side wind as it were.

34. The writ appeal is by a person who is entitled to admission in terms of the prospectus having regard to the marks scored by her. The writ appellant is clearly entitled to admission. The writ appeal is, therefore,

allowed. The writ petitions a ismissed.

(Jayasimha Babu, J.)
01.11.2002

Index : Yes

Net : Yes

Dev/mf